IN THE SUPERIOR COURT OF BRYAN COUNTY
STATE OF GEORGIA

HOME BUILDERS ASSOCIATION OF SAVANNAH, INC. d/b/a HOME BUILDERS ASSOCIATION OF GREATER SAVANNAH,	)	
Plaintiff,	)	Civil Action File No.: SUV2019000044
v.	)	
BRYAN COUNTY, GEORGIA, a political subdivision of the State of Georgia; and CARTER INFINGER, NOAH COVINGTON, WADE PRICE, STEVE MYERS, BRAD BROOKSHIRE, and GENE WALLACE, individually and in their official capacities as current Bryan County Commissioners, and constituting the Board of Commissioners of Bryan County, Georgia,	)	
Defendants.	)	

ORDER ON DEFENDANTS' MOTION TO DISMISS

This matter comes before the Court on Plaintiff's Complaint for Declaratory Judgment and Injunctive Relief, as amended (the "Complaint"), as well as Defendants' Motion to Dismiss the Plaintiff's Complaint, filed March 18, 2019 (the "Motion to Dismiss"). Having read the briefs filed by all parties in connection with each the Complaint and the Motion to Dismiss, the Court hereby finds as follows:

I. BACKGROUND

This matter concerns facial challenges to two ordinances recently passed by the Bryan County Board of Commissioners, to wit: (a) the Bryan County Development Impact Fee Ordinance (the "DIFO"), passed January 8, 2019, and made effective on April 1, 2019; and (b) the Interim Development Ordinance, passed October 9, 2018, and amended January 8, 2019. The DIFO is

intended to impose an "impact fee" against new growth and development as a condition of development approval in South Bryan County in order to raise revenue for funding roadway improvements in South Bryan County. The IDO sets forth various design and architectural guidelines governing single-family residential housing, including, by way of example, a prohibition on vinyl siding and a requirement that all homes have four roof planes visible from the front. Both ordinances are largely limited in application to South Bryan County.

Plaintiff filed suit on February 7, 2019, alleging that Bryan County's impact fee ordinance is unconstitutionally discriminatory on its face in violation of the equal protection clauses of the Georgia and United States Constitution; that it transgresses the parameters of the enabling act, O.C.G.A. §§ 36-71-7, *et seq.*; that it amounts to an unconstitutional taking of property without due process of law; and that it is an unconstitutional tax. As to the development ordinance, the Plaintiff alleged that the ordinance amounts to an unconstitutional taking of property without due process of law; that it amounts to unconstitutional exclusionary zoning and a violation of the equal protection clauses of the Georgia and United States constitutions; and that it violates the free speech rights of homebuilders and homebuyers under the Georgia and United States constitutions.

Defendants filed a Motion to Dismiss Plaintiff's Complaint on March 18, 2019, on various grounds, and the Plaintiff responded on April 1, 2019. Defendant filed a response brief on May 8, 2019, and the Plaintiff filed a surreply as to the issue of standing, only, on May 23, 2019. On May 10 and May 24, the parties argued the issue of standing before the Court. Now, the Court addresses each item of the Defendants' Motion to Dismiss in turn.

II. MOTION TO DISMISS

A. STANDARD OF REVIEW AND DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UNDER O.C.G.A. § 9-11-12(b)(6)

A motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless:

> (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor.
>
> In other words, a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. If, within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient.

Austin v. Clark, 294 Ga. 773, 774–75 (2014) (internal citations omitted) (quoting *Anderson v. Flake*, 267 Ga. 498, 501 (1997)).

Shortly after *Austin*, the Georgia Court of Appeals reversed a trial court's dismissal of a complaint, relying on the same minimal notice standard:

> [I]t is not necessary for a complaint to set forth all of the elements of a cause of action in order to survive a motion to dismiss for failure to state a claim. Rather, the Georgia Civil Practice Act requires only notice pleading and, under the Act, pleadings are to be construed liberally and reasonably to achieve substantial justice consistent with the statutory requirements of the Act. Thus, a motion to dismiss for failure to state a claim should not be granted unless the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof. Put another way, if, within the framework of the complaint, evidence may be introduced which will sustain a grant of relief to the plaintiff, the complaint is sufficient.

Islam v. Wells Fargo Bank, N.A., 327 Ga. App. 197, 202 (2014).

A complaint does not need factual detail, nor does a Plaintiff have to come forward with evidence to prove its complaint at the pleadings stage. It only needs to create an appropriate "framework." If the Court finds that, taking all the plaintiff's factual allegations as true, the plaintiff could never introduce any evidence to support the claim under the framework of the complaint, only then should a court dismiss a complaint.

Plaintiff's Complaint sets forth an appropriate framework for its claims against Defendants Bryan County as well as its individual county commissioners. The allegations in Plaintiff's Complaint do not disclose with certainty that Plaintiff would not be entitled to relief under any state of provable facts in support thereof; to the contrary, it is conceivable that the Plaintiff could introduce evidence within the framework of the Complaint that would sustain a grant of relief to the Plaintiff. The Court finds that Plaintiff's Complaint meets the minimum pleading requirements of the relevant case law as well as O.C.G.A. § 9-11-8. Under the circumstances, a "motion to dismiss for failure to state a claim should not be granted." *Islam*, 327 Ga. App. at 202. Defendants' Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim is therefore DENIED.

B. SOVEREIGN IMMUNITY

Defendants argue that Plaintiff's Complaint should be dismissed because the doctrine of sovereign immunity bars claims against the County and its commissioners in their official capacity.

First, the Georgia courts have long understood that the Takings Clause creates a "right, irrespective of legislative enactment, to bring an action against [the government]." *Lathrop v. Deal*, 301 Ga. 408, 426–28 (2017). Said another way, the doctrine of sovereign immunity will not bar an action against the government for unconstitutional takings of property, which Plaintiff asserted with respect to both the Interim Development Ordinance as well as the Development Impact Fee Ordinance. An unconstitutional taking occurs when the "damage to the owner is significant and

is not justified by the benefit to the public." *Barrett v. Hamby*, 235 Ga. 262, 265–66 (1975). Plaintiff has pleaded that it, on behalf of its members, has suffered significant injury from the IDO and the DIFO, and the Plaintiff has pleaded that the ordinances are not substantially related to the health, safety, or welfare of Bryan County. At the motion to dismiss stage, all that is necessary is that the Plaintiff create an appropriate "framework" into which evidence could be presented to support the claim. Regarding Plaintiff's Takings claims, it is conceivable that evidence could be introduced to give rise to a claim for relief, therefore Defendant's request that the Takings claim against the County be dismissed is DENIED.

Second, regarding the balance of Plaintiff's claims, the Court of Appeals recently clarified that the doctrine of sovereign immunity "does not bar suits for declaratory or injunctive relief brought against county officers in their individual capacities." *Love v. Fulton Cty. Bd. Of Tax Assessors*, 348 Ga. App. 309, 321 (2018). On May 10, 2019, this Court signed an Order granting the Plaintiff's Motion to add the Bryan County Commissioners, in their individual capacities, as defendants to this action. Therefore, while the doctrine of sovereign immunity may bar the balance of Plaintiff's claims as to Bryan County and its commissioners in their official capacities, the Plaintiff's Complaint for declaratory and injunctive relief may proceed as against the Commissioners individually. Therefore, Defendants' Motion to Dismiss Plaintiff's Complaint as barred by the doctrine of sovereign immunity is DENIED in part, with respect to Plaintiff's Takings claims against all Defendants as well as Plaintiff's claims against the individual commissioners, and GRANTED in part with respect to Bryan County and the commissioners in their official capacities.

C. ASSOCIATIONAL STANDING

Defendants assert that Plaintiff does not have standing to challenge the zoning ordinances at issue on behalf of its members because Plaintiff is an association and cannot meet the substantial interest aggrieved-citizens test set forth in *DeKalb County v. Wapensky*, 253 Ga. 47 (1984). This two-part test requires that a plaintiff (a) must have a substantial interest in the zoning decision and (b) this special interest must be in danger of suffering some special damage or injury not common to all property owners similarly situated." *Wapensky*, 253 Ga. at 48.

Defendant is correct that the Supreme Court has ruled that *civic organizations* do not have standing to enjoin zoning decisions unless the *civic* organization meets the substantial interest-aggrieved-citizens test. *E.g.*, *Lindsey Creek Area Civic Ass'n v. Consolidated Gov't*, 249 Ga. 488 (1982). However, the Supreme Court in *Aldridge v. Georgia Hosp. & Travel Ass'n*, 251 Ga. 234, 235–36 (1983) specifically distinguished the line of cases applying the two-pronged *Wapensky* test to civic organizations from a case involving *trade* associations such as the Plaintiff.

In *Aldridge*, the Court was faced with the question of a trade association's standing to challenge a hospitality inspection fee ordinance. In ruling that the trade association had standing, the Court acknowledged its earlier, but recent, decision in *Lindsey Creek Area Civic Association*, 249 Ga. 488, which was the first case to enunciate what became the *aggrieved citizen's* test of *Wapensky*. The Court in *Aldridge* held that *Lindsey Creek* was not controlling in the case at bar because *Lindsey Creek* involved a civic organization and "did not directly address the question of a trade association like [the plaintiff.]" *Aldridge*, 251 Ga. 236, n.1. Instead, the Supreme Court in *Aldridge* had to examine the standing issue from a different angle that would accommodate the unique situation of a *trade association* suing to protect the rights of its individual members. The Court concluded that the appropriate test to determine the standing of trade

associations is the three-pronged test set forth in *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977).[1] Accordingly, in *Aldridge*, the Supreme Court acknowledged that where the plaintiff challenging the ordinance is a *trade* association, such as the Plaintiff HBAS, as opposed to a civic organization,[2] the appropriate test for standing is the three-part associational standing test of *Hunt v. Washington*. As such, in *Aldridge*, the Supreme Court of Georgia adopted the *Hunt* associational standing test into Georgia's jurisprudence and specifically applied it to trade associations.

This three-part associational standing test has been applied in Georgia to home builders associations challenging zoning ordinances, including impact fee ordinances as challenged here. *See, e.g., Greater Atlanta Home Builders Ass'n, Inc. v. City of Atlanta, Ga.*, 149 F. App'x 846, 847–48 (11th Cir. 2005) (applying *Hunt* factors but finding no standing where HBA sued for monetary damages because associational standing is appropriate in cases seeking declaratory or

[1] This is because Georgia courts "frequently have looked to United States Supreme Court precedent concerning Article III standing to resolve issue of standing to bring a claim in Georgia's courts." *Feminist Women's Health Ctr. v. Burgess*, 282 Ga. 433, 434 (2007) (noting that in *Aldridge*, the Court "adopt[ed] three-part test for associational standing set forth in *Hunt v. Washington State*").

[2] For the reasons described, each of the cases cited by Defendants in its Response brief are misplaced because none address the relevant question of associational standing of a *trade* association. *Stuttering Foundation, Inc. v. Glynn County*, 301 Ga. 492 (2017) (plaintiff was a civic organization not a trade association and was merely a tenant in the rezoned property); *Massey v. Butts County*, 218 Ga. 244 (2006) (plaintiff was not a trade association but was an individual attacking the issuance of a building permit granted to another homeowner); *Dekalb County Bd. of Com'rs v. Druid Hills Civic Ann'n*, 269 Ga. 619 (1998) (plaintiff was a *civic* organization not a trade association, and did not have a property interest); *Lindsey Creek Area Civic Ass'n v. Consolidated Government of Columbus*, 249 Ga. 488 (1982) (plaintiff was civic association, not a trade association, and was challenging the rezoning of a neighboring property); *Tate v. Stephens*, 245 Ga. 519 (1980) (plaintiff was not an association but an individual seeking to strictly enforce zoning regulations); *Garden Hills Civic Ass'n, Inc. v. MARTA*, 256 Ga. App 367 (2002) (plaintiff was a civic organization, not a trade association, and was challenging the rezoning or a neighboring property); *Victoria Corp. v. Atlanta Merchandise Mart, Inc.*, 101 Ga. App. 163 (1960) (plaintiff was a corporation but not a trade association and did not have a property interest); *Save Our Dunes v. Alabama Dept. of Environmental Management*, 834 F.2d 984 (11th Cir. 1987) (plaintiff was a civic organization and not a trade association; in addition, the case turned on Alabama statutory law for challenging zoning decisions along its coastline, and is therefore inapposite).

injunctive relief); *Newton Cty. Home Builders Ass'n, Inc. v. Newton Cty.*, 286 Ga. App. 89, 91, n.5 (2007) (same)).

Accordingly, in Georgia, the doctrine of associational standing permits an association **that has itself "suffered no injury** to sue on behalf of its members when [1] the members would otherwise have standing to sue in their own right; [2] the interests the association seeks to protect are germane to the association's purpose; and [3] neither the claim asserted nor the relief requested requires the participation in the lawsuit of the individual members." *Sawnee Elec. Membership Corp. v. Georgia Dep't of Revenue*, 279 Ga. 22, 24 (2005) (citing *Aldridge v. Georgia Hosp. & Travel Ass'n*, 251 Ga. 234, 235–36 (1983); *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977)).

Associational standing is particularly appropriate when the Plaintiff seeks declaratory or injunctive relief, as opposed to monetary damages:

> [w]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.

Hunt, 432 U.S. at 343. In this case, the Plaintiff seeks the appropriate form of relief—declaratory and injunctive—to justify associational standing.

The Court now turns to an analysis of whether the Plaintiff HBAS meets each of the three-prongs of the associational standing test, and the Court finds that the HBAS satisfies the requirements for associational standing. First, the interests that the Plaintiff association seeks to protect are germane to the association's purpose. *Aldridge*, 251 Ga. at 236. The Plaintiff's mission

statement is to "promote home ownership and represent the concerns of the building industry of Chatham, Effingham, Bryan, & Liberty Counties." Pl's Ex. 2. Directly in line with Plaintiff's mission statement, this lawsuit challenges two ordinances on grounds that, inter alia, the ordinances threaten the ability of those in the building industry to construct homes at market-prices in Bryan County, which, in turn, might adversely affect the ability of many citizens to achieve the American dream of home-ownership.

Second, the Plaintiff's members would have standing to sue in their own right. *Aldridge*, 251 Ga. at 236. Specifically, the Plaintiff asserted in its Complaint, and submitted the affidavits of seven of its builder members, that various of its members own property in South Bryan County which property is subject to the challenged ordinances. The Court of Appeals has found a plaintiff to have a "substantial interest in the zoning decision" where the plaintiff was a "holder[] of a vested or inchoate title to real property. *Stuttering Found., Inc. v. Glynn Cty.*, 301 Ga. 492, 496 (2017).

Third and finally, neither the claims asserted nor the relief requested in the Plaintiff's Complaint requires the participation in the lawsuit of the individual members. *Aldridge*, 251 Ga. at 236. Because "this suit is primarily seeking declaratory and injunctive relief and does not present complicated issues of individual damages . . . the relief requested does not require the participation of the individual [HBAS] members." *Id.*

Defendants' Motion to Dismiss the Complaint for lack of standing is DENIED because Plaintiff may prosecute claims on behalf of its members pursuant to the doctrine of associational standing.

D. JUSTICIABLE CASE OR CONTROVERSY

Defendants contend that there is no justiciable case or controversy to give rise to Plaintiff's claims for declaratory judgment or injunctive relief because (a) Plaintiff cannot demonstrate harm

at the time the Complaint was filed and (b) Plaintiff's declaratory judgment cannot be based on a "possible or probable contingency" or a "remote possibility".

The Declaratory Judgment Act, as codified at O.C.G.A. § 9–4–1 *et seq.*, authorizes courts to declare the rights and other legal relations of "any interested party petitioning for such declaration, whether or not further relief is or could be prayed" (a) in cases of actual controversy; or (b) in any civil case in which it appears to the court that the ends of justice require that the declaration should be made. O.C.G.A. § 9–4–2(a)-(b). The Act has been broadened to provide relief in cases where no actual controversy exists but a justiciable controversy exists. O.C.G.A. § 9–4–2(b); *Baker v. City of Marietta*, 271 Ga. 210 (1999). There is a justiciable controversy "[w]here a concrete issue is present, and there is a definite assertion of legal rights, and a positive legal duty with respect thereto, which are denied by the adverse party." *City of Nashville v. Snow*, 204 Ga. 371, 377–78 (1948); *see also Atlanta Cas. Co. v. Fountain*, 262 Ga. 16, 17, 413 S.E.2d 450, 451 (1992).

Furthermore, "[i]t has repeatedly been recognized by the federal courts at all levels that violation of constitutional rights constitutes irreparable harm as a matter of law." *Cohen v. Coahoma County, Miss.*, 805 F.Supp. 398 (1992) (citations omitted). In addition, it is well settled under Georgia law that land is deemed sufficiently unique to enjoy special protection by equitable remedies, including temporary and interlocutory injunction. *See Focus Entertainment Intl. v. Partridge Greene, Inc.*, 253 Ga. App. 121 (2001), and the cases cited therein.

The "case or controversy" to support declaratory judgment is present where a county, as here, is alleged to not have constitutional authority to enact an ordinance. *Channell v. Houston*, 287 Ga. 682, 687 (2010) ("Without the Board having the constitutional authority to create a special tax district funding the duties of a constitutional officer such as Houston, it was not error for the

trial court to enter the declaratory judgment and to enjoin the implementation of the special tax district."); *Fulton County v. Legacy Inv. Group, LLC*, 296 Ga. App. 822, 828 (2009); *DeKalb Real Estate Bd., Inc. v. Chairman and Bd. of Commissioners of Roads and Revenues for DeKalb County, Georgia*, 372 F. Supp. 748 (1973). Accordingly, federal and state courts agree that where a plaintiff alleges that an ordinance violates its constitutional rights, a justiciable case or controversy exists as a matter of law.

Even if this were not the case, where threatened government action is concerned, a plaintiff is not required to wait until the plaintiff is harmed, or otherwise expose him or herself to liability, before bringing suit to challenge the basis of the threat (*i.e.*, the constitutionality of a law or ordinance to be enforced). *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007).[3] This is particularly true where, as in this action, a facial challenge is made to an ordinance because "facial challenges . . . have no ripeness requirement". *Greater Atlanta Homebuilders Ass'n v. DeKalb Cty.*, 277 Ga. 295, 296–97 (2003); *see also Vill. of Euclid*, 276 U.S. at 386; *King v. City of Bainbridge*, 272 Ga. 427, 427 (2000) ("There is . . . no exhaustion requirement when, as in the present case, the property owner challenges the constitutionality of an ordinance on its face.") (citations omitted).

Plaintiff has raised facial constitutional challenges against both the IDO and the DIFO, including the County's authority under the police powers to enact the ordinances. The Court finds that the Plaintiff has demonstrated the presence of a justiciable case or controversy with respect to the Plaintiff's personal and real property rights and the Defendants' newly enacted ordinances.

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[3] *Compare MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007) *with O'Kelley v. Cox*, 278 Ga. 572, 573 (2004) ("The judiciary is vested with the power to determine the constitutionality of legislation, but at present there is simply no legislation which can be the subject of a constitutional attack. All that does exist is a resolution of the General Assembly proposing that the Georgia Constitution be amended . . . ."); *Fulton Cty. v. City of Atlanta*, 299 Ga. 676, 678 (2016) (questions about merely proposed legislation present no justiciable controversy, and judicial attempts to resolve such questions amount to advisory opinions). Both the IDO and the DIFO are effective.

Plaintiff is not subject to an exhaustion requirement, and Plaintiff will not be required to wait until it is harmed or subject to liability to seek protection from this Court with respect to the ills it has claimed. Therefore, Defendants' Motion to Dismiss is DENIED.

E. EQUAL PROTECTION

Defendants argue that Plaintiff has failed to set forth an appropriate "as-applied" equal protection challenge. Plaintiff correctly notes that its challenge to the DIFO is a facial challenge, not an as applied challenge. Where, as here, the facially-challenged classification does not involve a fundamental right or a suspect class, a rational basis standard applies. *See, e.g., Harper v. State*, 292 Ga. 557 (2013). In order to prevail on its facial challenge to an ordinance on equal protection grounds where neither a suspect class nor a fundamental right is involved, Plaintiff must show that the challenged classification is not rationally related to a legitimate government interest. Plaintiff claims that the DIFO exemption unconstitutionally singles out residential home builders as the only class of builders—otherwise similarly situated—that are categorically ineligible for an exemption under the statute, for no purpose rationally related to a legitimate government interest. The Plaintiff has properly stated a framework for an equal protection claim on a facial challenge, and it is conceivable that the Plaintiff could introduce evidence to substantiate its claim. Dismissal is therefore improper, and Defendants' Motion to Dismiss is DENIED.

F. DUE PROCESS

a. Property and Land Use Rights

The "substantive component of the Due Process Clause protects those rights that are fundamental, that is, rights that are implicit in the concept of ordered liberty." *McKinney v. Pate*, 20 F.3d 1550, 1556 (1994). Defendants argue that Plaintiff's claims that the IDO and the DIFO violate the due process clause of the United States and Georgia constitutions because the land-use

rights, such as Plaintiff raises, are created by state law and not entitled to substantive due process protection. *E.g.*, *Greenbriar Village, LLC v. Mountain Brook, City*, 345 F.3d 1258, 1263 (11th Cir. 2003). However, "[w]here an individual's state-created rights are infringed by 'legislative act,' the substantive component of the Due Process Clause generally protects him from arbitrary and irrational action by the government." *Lewis v. Brown*, 409 F.3d 1271, 1273 (11th Cir. 2005) (citing *McKinney*, 20 F.3d at 1557 n.9). Thus, when a landowner is deprived of state-created rights by a legislative action, as opposed to executive action, those "rights created by state law may indeed constitute property subject to the arbitrary and capricious substantive due process protections under the federal Constitution." *Villas of Lake Jackson, Ltd. v. Leon Cnty.*, 121 F.3d 610, 614 (11th Cir. 1997).

Determining whether an act is legislative or executive can be difficult, especially when dealing with "county commissioners who act in both a legislative and executive capacity." *Lewis*, 409 F.3d at 1273. However, facial challenges to ordinances have been held to be a challenge to legislative action, as opposed to executive action, so as to support a substantive due process claim. *LHR Farms, Inc. v. White Cty.*, Georgia, No. 2:09-CV-00177-WCO, 2012 WL 12932609, at *18–20 (N.D. Ga. Mar. 22, 2012). ("There is little difficulty in concluding that White County's *enactment* of the ordinance was legislative action."); *Crymes v. Dekalb Cnty.*, 923 F.2d 1482, 1485 (11th Cir. 1991) ("Acts of zoning enforcement rather than rulemaking are not legislative."); *McKinney*, 20 F.3d at 1557 n.9. (distinguishing that the promulgation of 'laws and broad-ranging executive regulations' are legislative acts"). In *White County*, the challenged ordinance created a new permitting scheme for all persons wishing to operate a land disposal and land treatment site, and the Court found this permitting ordinance to be a legislative act. In so ruling, the court affirmed

that the federal Constitution protects real property from a County's arbitrary and capricious action in passing unlawful and unconstitutional ordinances. *Id.*

Like the challenged ordinance in *White County*, the DIFO and the IDO create new permitting schemes for residential and other builders, with the former imposing a condition upon development and permitting, and the latter creating a scheme of development regulations, compliance with which are conditions precedent to obtaining a building permit in Bryan County. Accordingly, the DIFO and the IDO clearly comprise legislative actions that, Plaintiff alleges, infringes constitutionally protected property rights for which a substantive due process claim will lie under the foregoing authorities. Therefore, Defendants' Motion to Deny Plaintiff's Substantive Due Process claims is DENIED.

b. Facial Challenge to IDO and DIFO

Defendants argue that Plaintiff's facial constitutional challenges to the IDO and the DIFO should be dismissed because the ordinances enjoy a presumption of constitutionality. *Old S. Duck Tours v. Mayor &c. of Savannah*, 272 Ga. 869, 871 (2000) While zoning ordinances do enjoy a presumption of validity, a local zoning ordinance is invalid if it is not substantially related to the public health, safety, or welfare. *Id.* at 872. Where an ordinance does not realistically serve a legitimate government purpose, and it employs means not reasonably necessary to achieve that purpose, the ordinance will fall to a due process challenge. *Atlanta Taxicab Co. Owners Ass'n v. City of Atlanta*, 281 Ga. 342, 348 (2006).

For purposes of a motion to dismiss, Plaintiff is required only to plead an appropriate framework into which evidence could be introduced to support the claim. Plaintiff's Complaint sets forth many distinct and detailed ways in which it avers that the DIFO will result in a disproportionate burden to home builders, and it has likewise set forth many specific ways in which

it avers that the IDO will harm homebuilders in Bryan County. It is conceivable that the Plaintiff could introduce evidence supporting its claims that the challenged ordinances are facially unconstitutional, offending due process, because they do not further any legitimate government purpose.

Defendant argues that because it passed the DIFO upon adoption of the Capital Improvements Element as an amendment to its Comprehensive Plan, there is a de facto legitimate government purpose to support the DIFO. *Mot. to Dismiss* at 20. The Supreme Court of the United States has expressly rejected Defendants' argument on this point, making clear that the mere fact that a zoning ordinance or regulation is enacted pursuant to a comprehensive plan of community development does not make it immune from the rule that where the "regulation goes too far it will be recognized as a taking." *Nollan v. California Coastal Com'n*, 483 U.S. 825, 853 (1987). Accordingly, the Plaintiff has stated a facial challenge to both the IDO and the DIFO by arguing that both ordinances are arbitrary and capricious and not reasonably related to a legitimate government purpose.

Defendants' Motion to Dismiss Plaintiff's facial Due Process challenges to the IDO and the DIFO are therefore DENIED.

c. First Amendment

Defendants present three arguments as to why plaintiff's First Amendment claim should fail, namely: i) architecture is not "conduct that is inherently expressive"; ii) the design requirements in the IDO do not restrict expression; and 3) the IDO is "not so vague and indefinite that it cannot be interpreted by persons of common intelligence, nor is it vague in all its applications." *Mot. to Dismiss* at 21–22.

The threshold inquiry for First Amendment speech claims concerns whether there is expressive conduct. *Texas v. Johnson*, 491 U.E. 397, 403 (1989). To determine what is expressive conduct, the Supreme Court directs us to look at whether there is "an intent to convey a particularized message . . . and [whether] the likelihood was great that the message would be understood by those who viewed it." *Id.* at 404. As explained, a "particularized message" does not equate to just a "narrow, succinctly articulable message," as the First Amendment applies to "the unquestionably shielded [abstract] painting of Jackson Pollock, music of Arnold Shoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995).

Architecture and home design are expressive conduct protected by the first amendment. Architecture is "the art or practice of designing and building structures and especially habitable ones." Merriam Webster's Collegiate Dictionary (10th ed. 2002). Congress recognized the expressive and artistic value of architecture in The Architectural Works Protection Copyright Act of 1990, which grants copyright protection to designs embodied in works of architecture. The Act defines "architectural work" as: "the design of a building as embodied in any *tangible medium of expression*, including a building, architectural plans, or drawings. . . ." 17 U.S.C. § 101 (emphasis added). In the legislative history of the Act, Congress explained:

> Architecture plays a central role in our daily lives, not only as a form of shelter or as an investment, but also as a **work of art.** It is an art form that performs a **very public, social purpose . . . . Architecture is not unlike poetry,** a point made by renowned critic Ada Louise Huxtable who wrote that architects can make "poetry out of visual devices, as a writer uses literary or aural devices."

H.R. Rep. No. 101–735 (1990), reprinted in 1990 U.S.C.C.A.N. 6935, 6943. Thus, Architecture is widely understood, and rationally so, to be a form of expressive conduct "not unlike poetry" and performing a "very public, social purpose," which characteristics are the exact underpinnings

justifying the First Amendment protections afforded to all other non-verbal, expressive conduct or artwork. *See also, Joseph Burstyn, Inc.*, 343 U.S. at 501.

Just like paintings, books, poetry, and songs, architecture is expressive conduct often carrying a public and social message. Architecture may convey a political message, like war memorials, monuments, or the domes of the U.S. Capitol Building and countless other state capital buildings and city halls. In other instances, architecture may reflect the expression of an individual architect's "conception of the desired relationship between individuals and society." Kevin G. Gill, *Freedom of Speech and the Language of Architecture*, 30 HASTINGS CONST. L.Q. 395, 408 (2003); The iconic works of Frank Lloyd Wright and Frank Gehry, for example, are as much a global statement about society as they are a reflection of individual creativity.

The single-family residence, central to Plaintiff's lawsuit, may be less revered than the works of Frank Lloyd Wright, but it is undoubtedly "an extension of one's own physical being, an expression of personal identity and social aspiration." John Nivala, *Constitutional Architecture: The First Amendment and the Single Family House*, 33 SAN DIEGO L. REV. 291, 318 (1996). Indeed, "[a]n architect – or the builder of a house working through an architect—uses brick as a painter uses a canvas or a writer uses words to express his notions of beauty and comfort, as well as many of his social values." *Id.* at 316 n.145 (citation omitted). This artistic expression in architecture permeates both the majestic mansions in Savannah's historic district and quality affordable housing, where "even the most standard of tract houses, says something; the house, in particular, says something about the inhabitants, something which can be read by them, by their neighbors, by passersby." *Id.* at 310-11. The house itself speaks of builder and buyer, quietly articulating their common ideas of comfort, beauty, and socio-economic values, particularly echo's

the Plaintiff's stated mission of promoting the American dream of homeownership at all income levels.

Because architecture and home design are expressive conduct, the Plaintiff has set forth an appropriate First Amendment claim challenging the IDO as violating the First Amendment by its architectural and design-based requirements and restrictions upon the single-family residence. Plaintiff may present evidence that the specific architectural and design regulations of the IDO restrict the expressive conduct, in terms of architecture and design, of home builders in Bryan County. Therefore, Defendants' Motion to Dismiss Plaintiff's First Amendment Challenge to the IDO is hereby DENIED.

WHEREFORE, Defendants' Motion to Dismiss is DENIED in part and GRANTED in part.

AND IT IS SO ORDERED, this 31 day of July, 2019.

Robert L. Russell III, Chief Judge
Atlantic Judicial Circuit, Bryan County